



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2004

Mr. Andrew A. Chance
Chappell, Hill & Lowrance, L.L.P.
2501 Parkview Drive, Suite 220
Fort Worth, Texas 76102

OR2004-7074

Dear Mr. Chance:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207538.

The Rio Vista Independent School District (the "district"), which you represent, received a request for information. You claim that the requested information is excepted from disclosure under sections 552.026, 552.107, 552.111, and 552.135 of the Government Code.

We must address your obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Public Information Act (the "Act") is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e).

In this case, while you state that you have submitted a written copy of the request for information, we note that your submission of June 16, 2004 does not include a copy of the written request. Furthermore, you have not submitted written comments explaining why your claimed exceptions should apply to the information at issue. Finally, although the district is required to submit a copy or representative samples of the specific information requested, you have failed to submit a copy or sample of the information you contend is protected by the attorney-client privilege. *See* Gov't Code § 552.301(e). Thus, we determine that you have failed to comply with the procedural requirements of section 552.301 in requesting a decision from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Sections 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body. Thus, section 552.107 and section 552.111 do not demonstrate compelling reasons to withhold information from the public. *See* Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Furthermore, you have not demonstrated a compelling reason to withhold the information at issue pursuant to the attorney-client privilege. *See* Open Records Decision Nos. 676 at 12 (2002) (compelling reason may be demonstrated for attorney-client privileged communications if it is shown that the release of the information would harm a third party). Consequently, we determine that the district may not withhold any of the information at issue pursuant to the attorney-client privilege or section 552.111 of the Government Code. Because sections 552.026 and 552.135 can provide a compelling reason to overcome the presumption of openness, however, we will address your claims under these exceptions.

Section 552.026 of the Government Code provides that the Act "does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974 ["FERPA"], Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g." Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution, or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The submitted documents contain information identifying a district student. We find that the records identifying the student are education records for purposes of FERPA. Information must be withheld from required public disclosure under FERPA to the extent reasonable and necessary to avoid personally identifying a particular student. *See* Open Records Decision Nos. 332 (1982), 206 (1978). Accordingly, we have marked information in a portion of the submitted documents that the district must withhold pursuant to FERPA. We note, however, that the remaining submitted documents do not contain any information directly related to any district students and do not

constitute education records for purposes of FERPA. Accordingly, the district may not withhold any portion of the remaining information pursuant to section 552.026 of the Government Code in conjunction with FERPA.

You also raise section 552.135 of the Government Code. Section 552.135 excepts from disclosure the identity of a school district "informer" and provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). In this case, we find you have failed to establish that any district

employee identified in the submitted documents reported a violation of law. Accordingly, we determine that the district may not withhold any of the submitted information pursuant to section 552.135 of the Government Code.

We note that the submitted documents contain information that is protected by common-law privacy. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, specific illnesses, procedures, and physical disabilities). We have marked information in the submitted documents that is protected by common-law privacy and must be withheld under section 552.101 of the Government Code.

The submitted documents also contain information that may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. We therefore determine that if district personnel whose information appears in the submitted documents timely elected to keep such information confidential pursuant to section 552.024, the district must withhold the information we have marked in the submitted documents pursuant to section 552.117(a)(1). If, however, the district personnel at issue did not timely elect to keep the information confidential, the district may not withhold this information under section 552.117(a)(1).

We note, however, that in the event the district employees at issue did not timely elect to keep the marked social security numbers confidential, the social security numbers may nevertheless be excepted under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that the social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public

disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the district should ensure that the social security numbers were not obtained or maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, the submitted documents contain Texas driver's license numbers. Section 552.130 of the Government Code provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. The district must withhold the Texas driver's license numbers we have marked in the submitted documents pursuant to section 552.130 of the Government Code.

In summary, the district must withhold the student identifying information we have marked in the submitted documents pursuant to FERPA. We have marked information that is protected by common-law privacy and must be withheld under section 552.101. In the event the district personnel at issue have timely elected to keep the information we have marked in the submitted documents confidential pursuant to section 552.024 of the Government Code, the district must withhold this information pursuant to section 552.117(a)(1) of the Government Code. Otherwise, this information must be released; however, social security numbers may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. We have marked Texas driver's license numbers that must be withheld under section 552.130 of the Government Code. The remainder of the information at issue must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

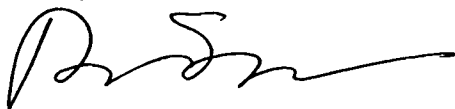
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 207538

Enc: Submitted documents

c: Ms. Tracy Russek
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(w/o enclosures)